

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY, JAY MYERS and DALE  
KENNETH GRASSMAN,

Appellants,  
Vs. United States of America,

No. 21584

Appellee.  
Seattle, Washington 98104

APPELLANTS' BRIEF ON APPEAL  
WESLEY JAY MYERS

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JURISDICTIONAL STATEMENT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE	)	
KENNETH GRASSMAN,	)	
	)	
Appellants,	)	No. 21584
	)	
Vs.	)	
	)	
UNITED STATES OF AMERICA,	)	PETITION FOR RE-HEARING
	)	ON APPEAL
Appellee.	)	

Defendant, Wesley Jay Myers, respectfully  
moves for an order permitting a re-hearing on the  
appellate process initiated by Defendant, argued  
8 January 1968 and the subject of opinion by this  
Court.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESLEY JAY WING AND WIFE  
KENNETH GRASMAN,

Appellants,

vs.

UNITED STATES OF AMERICA.

Appellee.

NO. 31871

APPELLANT, WESLEY JAY WING AND WIFE  
APPELLEE, UNITED STATES OF AMERICA

TESTIMONIAL STATEMENT

The jurisdiction of the United States District  
Court for the District of Oregon is shown to be in question  
1231.

This Court has jurisdiction by virtue of 28 USC Section 1291.

The indictment charges offenses against the Laws of the United States.

The Transcript of Proceedings will be referred to as Tr.

#### STATEMENT OF THE CASE

The Appellants, Wesley Jay Myers and Dale Kenneth Grassman, were jointly indicted on two counts, Count I charged illegal transportation of a motor vehicle from Portland, Oregon to Seattle, Washington, and Count II recited a similar charge involving a different motor vehicle, each Count alleged to be in violation of Title 18, U. S. Code Section 2312.

#### IDENTIFICATION OF THE PARTIES

Wesley Jay Myers and the co-appellant, Dale Kenneth Grassman, were engaged at Portland, Oregon in the business of purchasing wrecked motor vehicles, accomplishing necessary repairs or replacement of parts and the subsequent resale of the automobiles.

In the operation of this enterprise, the two Appellants were engaged in an informal association. The repair shop and yard was maintained in the City of Portland, Oregon principally by the Appellant, Grassman. The Appellant, Myers, was most often gone from the shop and spent little time there.



This Court has jurisdiction to try the case.

Section 1991.

The indictment charges that the defendant

of the United States.

The transcript of proceedings will be delivered to

as far

### RECAPITULATION OF THE CASE

The Appellants, Wesley Jay Myers and John A. Grissman,

Grissman, were jointly indicted on two counts. Count I charges

illegal transportation of a motor vehicle from California, to wit,

to Seattle, Washington, and Count II charges a similar offense

involving a different motor vehicle, each count alleged to be

in violation of Title 18, U. S. Code, Section 2382.

### IDENTIFICATION OF THE VEHICLE

Wesley Jay Myers and the co-appellant, John A. Grissman,

Grissman, were engaged at Los Angeles, California in the business of

purchasing wrecked motor vehicles, and repairing and

resale or replacement of parts and the subsequent resale of

the motor vehicles.

In the operation of this enterprise, the

Appellants were engaged in an illegal enterprise. The report

shop and yard was maintained in the city of Los Angeles, California.

Primarily by the Appellant, Grissman. The Appellant, Myers,

was most often gone from the shop and spent little time there.

The Appellant, Myers, did nothing by way of physical repair of the wrecks.

The Appellant, Myers, travelled often to California in search for wrecked vehicles, the condition of which would permit repair to a point where the automobile could subsequently be sold. The wrecks purchased in California or other areas were loaded aboard a transport vehicle and brought to the Portland shop where the vehicles were turned over to the Appellant, Grassman. (Tr. 313).

The Appellant, Myers, was licensed as an automobile dealer and had posted the bond as required. (Tr. 307).

Generally, Myers sought wrecked or salvaged motor vehicles and submitted bids or offers of purchase. Grassman stayed in the shop and supervised the repairs or restoration of the wrecked vehicles after their delivery from the source of purchase.

Vehicles repaired in Portland, Oregon were, on occasion, offered for sale through markets in the State of Washington. This point of sale was adopted for the reason that a better price or a more rapid turn over could result.

"The vehicles involved in these charges as allegedly stolen were purchased by Grassman from a third party, Lee, during absence of Myers from the Portland area." (Tr. 355 - 362).





Myers had no knowledge that the vehicles had been purchased independently by Grassman, nor did Myers know that identification insignia had been substituted by Grassman. (Tr. 365-367, 395-400).

The other facts are quite unimportant for purposes of this appeal, however, of serious importance is the content of questions asked by the Prosecutor in cross-examination of the Defendant, Grassman.

This important part of the trial record is as follows:

Q On or about August, 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?

Mr. Rousso: Objection, your Honor.

The Court: There is no ---

Mr. Rousso: (Interposing) Object to that. If Mr. Miller wants to testify, let him come to Court.

The Court: Sustain the objection.

Mr. Hess: I will rephrase it.

By Mr. Hess:

Q (Continuing) On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.

Q As a matter of fact, Mr. Grassman, after Mr. Myers was arrested on June 18th ---

1045

(Mr. Elliott rises.)

The Court: Just a minute.

Mr. Elliott: Your Honor, I have no objection but I didn't hear this question of Mr. Hess relative to going somewhere. I couldn't get him when he asked the witness whether he made a statement he was going to take everyone with him. I did not understand that.

The Court: The Reporter will read the question.

(Whereupon, the following was read by the Reporter:

"Q On or about August 19th did you make any statement to the effect if you went down the tube you were going to take everyone with you?

A I did not.")

Mr. Elliott: Your Honor, I am going to object to it because --- making a statement to whom? The question is a highly prejudicial question and it has no basis in the testimony at all. It is simply a wild spear thrown in the direction of the witness.

Mr. Rousso: Your Honor ---

Mr. Elliott: (Interposing) If he wants to lay ground for this, let him do it.

Mr. Rousso: Your Honor, I would like the jury to be excused, if possible.

The Court: To be excused?

Mr. Rousso: Just for a moment or two.

The Court: All right, Members of the Jury, the

(Mr. Telford rises.)

The Court: Just a moment.

Mr. Telford: Your Honor, I have an objection.

I didn't hear any objection at the time I was asked to go.

Somebody, I couldn't see the man who asked me to go.

He said he was a witness, and he was in the room.

With him. I did not understand him.

The Court: The witness will stay in the room.

Thereafter, the following was said by the witness:

It is not about me. It is about the man who

stated to me that it was about the man who

was going to be a witness.

A: I did not.

Mr. Telford: Your Honor, I am going to object to

it because -- saying a statement to me. The witness is

a highly qualified person and he is not a witness.

Testimony of all. It is a very high level of

direction of the witness.

Mr. Telford: Your Honor.

Mr. Telford: (Repeating) It is not a witness.

There is no objection.

Mr. Telford: Your Honor, I am going to object to

the witness, it is not a witness.

The Court: No objection.

Mr. Telford: Just a moment, it is

the Court: All right, it is not a witness.



Court will hear from Counsel on this matter in the absence of the Jury and I will excuse you and ask you to heed the admonition given you before at this time.

(Whereupon, the Jury retired from the courtroom).

The Court: Do you wish to make a statement?

Mr. Rousso: Yes, Your Honor. At this time, on behalf of the Defendant Grassman, I would move for a mistrial.

We have a situation here where the condition which the government has thrown in this statement has to be highly prejudicial regardless of how the man answered it.

If there is a Mr. Miller, and such a statement was made to him, the opportunity was present for the government to bring it in on their direct and to testify to any conversation made with this Defendant. That was not done.

If we allow this type of thing, why then we could spend the next day in here ---

The Court: (Interposing) I am inclined to agree it is erroneous and somewhat prejudicial.

I will ask, Mr. Hess, on what theory you ask this? It is highly improper, it seems to me.

Mr. Hess: Your Honor, I asked it on this basis: An out-of-court statement made by the witness and he was present there.

The Court: If he said the moon was made of green cheese, is that material?



Mr. Hess: If it relates to this case, it is,

your Honor.

The Court: I don't know who Miller is. If you have an admission, it seems to me you have to bring it in on direct.

Mr. Hess: Well, I am sorry. I had a basis in a report.

The Court: Why don't you put a witness on?

Mr. Hess: Frankly, I didn't have reason to rely on the veracity of Mr. Miller.

Mr. Elliott: We join in the motion.

The Court: I will strike it. I will not declare a mistrial.

I certainly will have to tell them you are in error in asking it and they are to disregard it entirely.

I will caution you, Mr. Hess, that it is not proper for the government to throw in damaging statements.

Mr. Hess: I have a basis in the record that it was made.

The Court: That doesn't make any difference.

When was it in the evidence that he said that?

What do you rely on, at all?

Mr. Hess: I am relying on him as a witness.

The Court: What witness on direct?

You can not come in on cross examination and ask something by way of an admission unless you have some testimony

Mr. Nease: It is not a matter of fact.

Your Honor.

The Court: I don't know what it is, it is not.

have an admission, it seems to me you have to make it in the

direct.

Mr. Nease: Well, I am sorry, I am a little bit of a

report.

The Court: Why don't you get a witness and

Mr. Nease: Truly, I don't know where to go to

the vicinity of Mr. Nease.

Mr. Nease: We don't know where to go to.

The Court: I will leave it. I will not

a witness.

I certainly will not go to the house of Mr. Nease.

in asking it and the fact is that it is not

I will caution you, Mr. Nease, that it is not

proof for the government to show in its evidence.

Mr. Nease: I have a question to ask the Court and it

was asked.

The Court: That is all, I have no question.

When you go to the house of Mr. Nease, you will find

that you will find it is not

Mr. Nease: I am relying on the fact that

The Court: That is all, I have no question.

You can see that it is not a matter of fact.

Someone is not of an unbiased mind for the fact that



to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it; but it seems to me that you are seeking to get in testimony here that could be prejudicial.

I am hesitant to grant a motion for a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind.

Mr. Elliott: Your Honor, may I make a further statement?

The Court: Go ahead.

Mr. Elliott: Your Honor recognizes the respect we have for this Court and this is discretionary with your Honor on this motion but it is our contention here that irrefutable damage has been done because of this question and answer and we simply want to join~~x~~ for the Defendant Myers.

The Court: All right.

Mr. Elliott: Thank you.

The Court: I assume, Mr. Hess, it is your thought that this constitutes, in some way, some kind of admission?

Mr. Hess: That was my thought, your Honor - an admission of the Defendant Grassman.

(Whereupon, the jury was returned to the courtroom).

The Court: Members of the Jury:

I am going to advise you at this time with regard to the testimony that came in a few minutes ago to which objection

to that effect.

In other words, it seems to me it is not  
quite on which it is proper and which is not  
seems to me that you are seeking to put in evidence  
that could be prejudicial.

I am satisfied to admit I was in a position  
however, and I will advise the jury in accordance with the law  
and be cautious that I do not in any way prejudice the  
as an examination of the facts.

Mr. Allright: That would be a fair answer.

statement?

Mr. Allright: Yes, please.

Mr. Allright: Your Honor, I am going to ask the jury  
to have for this Court and this is the history of the case  
on this matter but it is not a question of fact and I am  
damaged has been done to the reputation and honor of  
we simply want to have the jury find the facts.

Mr. Allright: All right.

Mr. Allright: That is all.

Mr. Allright: I submit to you, as I have submitted  
that this confession is true and that the facts are  
of your Honor, I am going to ask the jury to find that I am  
satisfied of the defendant's guilt.

Mr. Allright: The fact that I am going to ask the jury  
to find that I am guilty of the crime.

I am going to ask the jury to find that I am guilty of the crime  
and that the facts are as I have submitted to you.

was made.

It is my view that it was a highly prejudicial type of question and should not have been asked by the Government,..... (Tr. 400 Line 25 through Tr. 406 Line 2.)

### SPECIFICATION OF ERRORS

#### Specification of Error Number 1.

Error in refusal to grant an immediate mistrial following improper questions of the prosecutor, in that the implication and innuendo of the questions was irrevocably prejudicial to Defendants.

#### Specification of Error Number 2.

Error inherent in the situation which permitted jury to hear evidence purportedly from the mouth of "Miller" who was never placed on the witness stand and to thereby deny to Defendants the right to confront this "witness" and to cross-examine him as provided by Amendment VI, Constitution of the United States.

#### Specification of Error Number 3.

Error in assertion of the court to the jury while seeking to correct the impropriety of the prosecutor and error in court's ruling that the gross violation of Defendants rights by the prosecution could be corrected in the jurors minds by admonishment that the improper evidence be disregarded.



It is my view that it was a direct suggestion

type of question and should not have been asked in this

Government, . . . (It is also the fact that the

### IDENTIFICATION OF STAGES

Specification of stage number 1

There is no need to give an identified subject

following important elements of the testimony, in order to

indication and inference as to whether or not

testimony is false.

Specification of stage number 2

There is no need to give an identified subject

any to hear evidence from a witness who is

was never given of the witness and the

deny to determine the truth or otherwise of

to cross-examine him as provided by section 17 of the

of the United States.

Specification of stage number 3

There is no need to give an identified subject

adding to clarify the testimony - the witness

error in order to clarify the testimony of the

reason by the witness, which is not to be

made by a witness and the witness is not



## ARGUMENT

### ERROR NO. 1.

Refusal to grant a mistrial upon immediate motion of Defendants following the question put to Defendant Grassman during cross-examination by the prosecutor: (The jury present).

"On or about August 1965, did you call John Miller and tell him, among other things, that if you went down the tube you were going to take everyone with you?" (Tr.400-401).

The prosecutor was permitted to rephrase the question after objection by Defendants.

"On or about August 19th did you make any statements to the effect that if you went down the tube you were going to take everyone with you?" (Tr. 401).

The jury was still present when the question was put the second time.

After second objection, the jury was removed and Defendants moved for a mistrial.

The court then unequivocally asserted that the questions were prejudicial and without foundation.

"You cannot come in on cross-examination and ask something by way of an admission unless you have some testimony to that effect.

In other words, it seems to me if you have some basis on which it is proper, you might submit it; but it seems to me that you are seeking to get in testimony here that could be prejudicial.

Page 100

Prison, to read a letter from his mother.

of the prison, following the arrest, and the prison

during the examination for the first time. The first

On the first night, 1947, in the first night

and told him, about the first night of the first

that you were going to the prison with your mother

The first night of the first night of the first

question after the first night of the first

"On the first night, 1947, in the first night

of the first night, it was the first night of the first

to take the first night of the first night

The first night of the first night of the first

and the first night of the first night of the first

after the first night of the first night of the first

reflections were for a letter

The first night of the first night of the first

questions were for the first night of the first

"You can see how it is in the first night of the first

something of the first night of the first night of the first

to that effect

In the first night of the first night of the first

heads on which it is the first night of the first

to the first night of the first night of the first

the first night

I am hesitant to grant a mistrial, however, but I will advise the jury to disregard it completely and be cautious that they do not, in any way, construe this as an admission of any kind." (Tr. 404-405).

The guidelines of propriety are clearly asserted by United States Supreme Court in:

Berger Vs. U. S. - 295 U.S. 78

55 Sup. Ct. 629

79 L. Ed. 1314.

The opinion states:

"Error in the conduct of a prosecuting attorney while examining witnesses is not cured by sustaining objections to some of his questions, insinuations, and misstatements, and instructing the jury to disregard them, where the situation was one which called for stern rebuke and repressive measures, and it is impossible to say that the evil influence upon the jury of those acts of misconduct was removed by such mild judicial action as was taken.

#### ERROR NO. 2.

The right to confront and cross-examine "John Miller" is a Constitutional guarantee and Defendant was denied this right.

That the testimony of "John Miller" was infected with untruth and doubt was clearly admitted by the prosecutor when he spontaneously replied to inquiry of the Court:



I am inclined to agree a partial, however, and

I will advise the jury to disregard it completely, and be  
cautions that they do not in any way, doubtless will be an  
admission of any kind. (Ex. 101-102)

The evidence in regard to the property and family matters

by United States Agents Cooper and

Deputy U.S. A. - 103-104

Ex. 105 - 106

Ex. 107 - 108

The opinion of the

"There is no evidence of a conspiracy to

while examining witnesses is not made by the jury

objections to some of the questions, testimony and

misstatements, and in addition the fact of conspiracy was

the situation was not such as to call for such remarks and

representative matters, and in its opinion is to be the

will influence upon the jury of those acts of conspiracy

was removed by such mild remarks as were made

#### Exhibit 109

The witness is confident and does not doubt that either

is a Communist, and that the witness is not sure that the

was the testimony of the witness and the witness is

anxious and does not clearly recollect in the testimony that

no opportunity existed in the mind of the jury



"Frankly, I didn't have a reason to rely on the veracity of Mr. Miller."

This admitted recognition by the prosecutor that "Millers" statement was not worthy of belief supplies the reason why "Miller" was not to be confronted in Court by the Defendants and not to be exposed to cross-examination by defense counsel.

Yet, the prosecutor was willing to vicariously burden the Defendants with the lies he attributed to the elusive "John Miller".

This type of conduct is the subject of comment in:

Ross Vs. U. S. 180 F 2d 160.

"In a criminal prosecution, the United States attorney is a representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest is, not that it will win the case, but that justice shall be done."

### ERROR NO. 3.

The Court committed error by appraisal of the situation, created before the jury by the prosecutor, to the effect that the improper evidence could be erased from the mind of each of the twelve jurors by statement that the

"Typically, I think about 2 years in jail in the

variety of the subject."

This subject's recollection of the experience was

positive. He stated that he was not aware of any other

reason why "Miller" was not to be considered in terms of the

experience and not to be placed in a more favorable

detention company.

Yet, the government was willing to place

prisoners in detention with the aim of returning to the

subject "John Miller."

The type of evidence in this subject's case

was

based on the fact that

in a criminal proceeding, the subject's

attorney is a representative, not an adversary, and the

a confession, and at a subsequent hearing, the subject

governed by the fact that it is a confession of the subject

governed by the fact that it is a confession of the subject

the case, but that the subject's

was not

The Court concluded that the subject's

allegation of error, which the Court found to be

without merit, and the subject's

and of course, of the subject's

evidence was not to be considered.

The grave apprehension of the court was apparent when the jury was addressed as to the importance of the questions.

The Court in admonishing the jury sought to correct the prejudice supplied by the prosecution and then in obvious inadvertance added emphasis to the harm:

"I emphasize that caution to you because the Defendants are entitled to a fair trial and you must find them guilty solely from the evidence that is proper and not from statements thrown in by error (emphasis supplied)." (Tr. 406).

No disrespect to the Court is intended but the graveness of the situation is explained perhaps by the spontaneous exclamation that the jury must find the Defendants guilty.

It is submitted that each of us as lawyers are boldly aware that a juror hears each word spoken by a Judge in any trial and receives each word of the Court as a thing especially bearing the mark of importance, truth and integrity. This is as it should be, but the infrequent irregularities bear some marks of dignity as do the rigid truths. This attitude of a jurors mind may well result in misunderstanding and we respectfully submit that any word spoken by a Court to a juror should be sterile of any remote insinuation that a Defendant should be found guilty. The weight of a single



evidence was not so convincing.

The jury was instructed that the jury was to determine when the jury was satisfied as to the facts of the case.

The jury in determining the facts of the case

must not be influenced by the testimony of the witness

in making their decision as to the facts of the case.

I am sure that the jury will be able to

reach a fair and just conclusion as to the facts of the case.

It is my duty to advise the jury that it is their duty

to return a verdict as to the facts of the case.

(Mr. 100)

It is my duty to advise the jury that it is their duty

to return a verdict as to the facts of the case.

It is my duty to advise the jury that it is their duty

to return a verdict as to the facts of the case.

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to return a verdict as to the facts of the case.

It is my duty to advise the jury that it is their duty

to return a verdict as to the facts of the case.

It is my duty to advise the jury that it is their duty

to return a verdict as to the facts of the case.



statement by the Court may well outweigh the testimony of many witnesses or the importance of compelling evidence.

Improper evidence cannot be erased and this premise is supported in *Berger Vs. U. S.* (Previously cited).

"Error..... while examining witnesses is not cured by sustaining objections, to (prosecutors)..... insinuations and misstatements and by instructing the jury to disregard them."

In *Turner Vs. Louisiana* 379 U.S. 466, the Court states:

"In the Constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a Defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the Defendant's right of confrontation, of cross-examination and of counsel."

It is respectfully submitted that these rights must not be subverted.

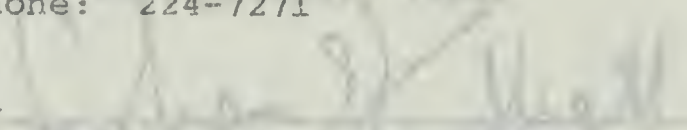
#### CONCLUSION

The judgment should be reversed.

Respectfully,

ELLIOTT, DAVIS, RADER & KITSON  
1220 S. W. Sixth Avenue  
Portland, Oregon  
Phone: 224-7271

By

  
Charles V. Elliott

statement of the Court was not intended to be a statement of  
any kind of the facts of the case.

The Court's statement is not intended to be a statement of the facts of the case.

It is not intended to be a statement of the facts of the case.

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THE COURT

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THE COURT  
The Court's statement is not intended to be a statement of the facts of the case.

THE COURT

STATE OF OREGON )

)

ss.

County of Multnomah )

I hereby certify that I served the foregoing Brief on Appeal on GERALD W. HESS, Assistant United States Attorney, on the 14th day of September, 1967, by mailing to him a true and correct copy thereof, certified by me as such. I further certify that said copy was placed in a sealed envelope, addressed to said GERALD W. HESS, Assistant United States Attorney, at 1012 U. S. Court House, Seattle, Washington 98104, his last known address, and deposited in the Post Office at Portland, Oregon on the 14th day of September, 1967, and that postage thereon was prepaid.

/s/ Charles V. Elliott

Of Attorneys for Appellant  
Wesley Jay Myers

State of Oregon )

)

ss.

County of Multnomah )

I hereby certify that I have prepared the foregoing copy of Appellant's Brief on Appeal; have carefully compared the same with the original thereof, and that it is a correct copy therefrom and of the whole thereof.

DATED; this 14th day of September, 1967.

Of Attorneys for Appellant  
Wesley Jay Myers



STATE OF OREGON  
County of Multnomah


I hereby certify that I served the foregoing  
Brief on Appeal on EDWARD W. HESS, Assistant United States  
Attorney, on the 14th day of September, 1937, by mailing  
to him a true and correct copy thereof, certified by me  
as such. I further certify that said copy was placed  
in a sealed envelope, addressed to said EDWARD W. HESS,  
Assistant United States Attorney, at 1011 N. W. Court House,  
Seattle, Washington 98104, his last known address, and  
deposited in the post office at Portland, Oregon on the  
14th day of September, 1937, and that postage thereon was  
prepaid.

W. C. CHAFFIN, Clerk  
Of Court for Multnomah  
County, Oregon

State of Oregon  
County of Multnomah

I hereby certify that I have prepared the foregoing  
copy of appellant's Brief on Appeal, have carefully com-  
pared the same with the original thereof, and that it is a  
correct copy thereof and of the whole thereof.

DATED: this 14th day of September, 1937.

  
W. C. CHAFFIN, Clerk  
Of Court for Multnomah  
County, Oregon



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WESLEY JAY MYERS and DALE KENNETH	)	
GRASSMAN,	)	
	)	
Appellants,	)	No. 21584
	)	
Vs.	)	
	)	
UNITED STATES OF AMERICA,	)	CERTIFICATION
	)	
Appellee.	)	

I certify that, in connection with the preparation of the brief in the above entitled matter, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Sgd/ Charles V. Elliott  
\_\_\_\_\_  
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